FILED
DEC 5 1951
CHARLES ELMORE CROP
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 464

UNITED AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Statement of Basis Upon Which Appellant Contends the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Order Appealed From as Required by Supreme Court Rule 12.

OSCAR A. TRIPPET,
458 South Spring Street,
Los Angeles 13, California,
Attorney for Appellant.

PAUL M. GODEHN,
JOHN T. LORCH,
EDMUND A. STEPHAN,
Of Counsel.

SUBJECT INDEX

PAGE

Statement of basis upon which appellant contends the Supreme Court of the United States has jurisdiction to review on appeal the order appealed from as required by Supreme Court Rule 12 1

Appendices:

Appendix A. Order denying petition for writ of review..... .....App. p. 1

Appendix B. Opinion of the Public Utilities Commission of the State of California.....App. p. 2

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Adams v. Decoto, 21 F. 2d 221	8
Adamson v. California, 332 U. S. 46	9
Bluefield Water Works and Improvement Company v. Public Service Commission of the State of West Virginia, 262 U. S. 679	9
Funeral Directors Association v. Board of Funeral Directors, 22 Cal. 2d 104	8
Lake Erie and Western Railroad Company v. State Public Utilities Commission of Illinois, 249 U. S. 422	9
Lincoln Federal Labor Union, No. 19129 v. Northwestern Iron and Metal Co., 335 U. S. 525	9
Live Oak Water Users' Association v. Railroad Commission of the State of California, 305 U. S. 354	9
McDonough v. Garrison, 68 Cal. App. 2d 318	8
Napa Valley Electric Company v. Railroad Commission of the State of California, 251 U. S. 310	8
Northern Pacific Railway Company v. Department of Public Works of Washington, 268 U. S. 39	9
People v. Gook, 69 S. C. 841, 336 U. S. 725	7
Sultan Railway & Timber Company v. Department of Labor and Industries, 277 U. S. 135	9

STATUTES	
California Constitution, Art. XII, Sec. 22	8
Civil Aeronautics Act of 1938 (52 Stat. 977)	4, 7
Civil Aeronautics Act of 1938 (52 Stat. 998)	7
Public Utilities Act, Sec. 67 (Deering's Gen. Laws, Act 6386)	8
United States Code, Title 28, Sec. 1257(2)	1, 9
United States Code, Title 49, Sec. 401	4, 7, 18
United States Code, Title 49, Sec. 486(b)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

NO. .....

UNITED AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Statement of Basis Upon Which Appellant Contends the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Order Appealed From as Required by Supreme Court Rule 12.

Pursuant to Supreme Court Rule 12, paragraph 1, the above appellant files this its statement particularly disclosing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the order and decision appealed from herein as follows:

I. The statute believed to sustain appellate jurisdiction in Section 1257(2) of Title 28 of the United States Code, which provides that final judgments or decrees rendered by the highest court of the state in which a decision could be had may be reviewed by the Supreme Court by appeal

where there is drawn in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

II. The order and decision appealed from were entered on the 2nd day of August, 1951, as appears from the certified copy of the minute order of the Supreme Court of the State of California dated August 2, 1951, on file with the clerk of said Supreme Court, and as set forth in 37 Adv. Cal. (minutes) p. (1). A copy of said order and decision is attached hereto as Appendix A. Under the practice of the State of California an order of the Supreme Court of the State of California denying a petition for a writ of review to review and annul an order of the Public Utilities Commission of the State of California amounts to an affirmation of such order and decision.

III. The application for an appeal was presented on the ..... day of October, 1951, as appears from the certified copy of the Order Allowing Appeal, on file with the Clerk of the Supreme Court of California.

IV. The appeal herein is from an order and decision of the Supreme Court of the State of California in a civil case denying appellant's petition for a writ of review, to review and annul an order and decision of the Public Utilities Commission of the State of California (a copy of which is attached hereto as Appendix B), thereby affirming the order and decision of said Commission, by which said Commission (1) held that appellant is subject to the regulatory authority of said Commission with respect to appellant's rates, fares and charges for transportation within the State of California, (2) ad-

jured and admonished appellant that it could not raise any rate or charge for the transportation of passengers and property in intrastate commerce between points within the State of California under any circumstances whatsoever except upon a showing before said Commission that such increase is justified, and (3) ordered that appellant should make reparation of certain fares to certain passengers who had been transported by it, as appears from pages 13 and 14 of the certified copy of the Opinion and Order (Decision No. 45624) of the Public Utilities Commission of the State of California in Case No. 5271 bearing date of April 24, 1951, said Opinion and Order being on file with the Clerk of said Public Utilities Commission. It is to be noted that said Opinion and Order do not constitute portions of the record on file with the Clerk of the Supreme Court of the State of California by reason of the fact that, under the practice of said state, in an original proceeding for writ of review the record of the inferior tribunal with respect to whose action review is sought does not become a part of the record of the reviewing court; nevertheless, since the Supreme Court of the State of California did not issue an opinion in connection with its affirmation of the Opinion and Order of the Public Utilities Commission, appellant respectfully submits that a certified copy of the Opinion and Order of said Commission should be presented to the Supreme Court of the United States in order that the basis of the decision of the Supreme Court of the State of California may be made apparent.

V. Appellant, a corporation organized and existing under the laws of the State of Delaware, is and for many years past has been engaged in the transportation by air of persons, property and United States mail for hire, pur-

suant to certificates of public convenience and necessity issued to it by the Civil Aeronautics Board of the United States under the provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. 401 *et seq.*). Under said certificates, appellant has conducted, and now conducts, air transportation services between the east and west coasts of the United States, along the west coast of the United States from San Diego, California, to Vancouver, British Columbia, and from the west coast of the United States to the Hawaiian Islands. As a part of its operations along the west coast of the United States, appellant furnishes transportation services under said certificates of public convenience and necessity between the Los Angeles area and the San Francisco bay area. Appellant operates, and at all time herein concerned has operated, a standard service, and, in addition thereto, an air coach service at rates substantially lower than those charged in its standard service. At the time in question herein, appellant operated, among other flights, four daily round trip air coach flights between Los Angeles and the San Francisco bay areas and one daily round trip air coach flight between the Los Angeles area and Seattle, Washington, via the San Francisco bay area. Appellant is authorized to transport United States mail on all of such flights and regularly transports and has transported such mail on such flights. Many passengers transported by appellant on such air coach flights between the Los Angeles and San Francisco bay areas are persons engaged in making interstate voyages.

Prior to March 1, 1951, the fare charged by appellant for one-way adult transportation in its air coach service between the Los Angeles and the San Francisco bay areas (whether in aircraft operating only between the Los An-

geles and San Francisco bay areas or in aircraft operating between the Los Angeles area and Seattle, Washington, via the San Francisco bay area) was the sum of $9.95, exclusive of Federal transportation tax. On or about February 5, 1951, appellant received a letter from the Chairman of the Civil Aeronautics Board of the United States advising it that said Board had investigated the financial results of appellant's operations at the rate of $9.95 and was of the opinion that such rate was economically unsound. The Chairman of said Board requested appellant to raise its rate and recommended a new rate of $11.70, exclusive of tax. Accordingly, appellant filed and published its tariff pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended, and the Economic Regulations of the Civil Aeronautics Board, raising its fare from $9.95 to $11.70, effective March 1, 1951. On or about February 9, 1951, appellant filed with appellee, Public Utilities Commission of the State of California, its application for approval of the proposed increase in fare. On March 1, 1951, appellant placed the increased fare in effect pursuant to its tariff duly published and filed under the Civil Aeronautics Act of 1938, as amended. At that date, its application filed with appellee had not been acted upon. On or about March 6, 1951, appellee issued its order instituting investigation in Case No. 5271, ordering an investigation into the fares, rules, regulations, charges, services, operations and practices of appellant and others, with particular reference to the fare charged by appellant and others for the transportation of passengers between the San Francisco bay area and the Los Angeles area in air coach service. Hearings were conducted by appellee on March 14 and March 27, 1951, at which appellant appeared and presented oral and written evidence and oral

argument, and thereafter filed briefs with appellee. On April 24, 1951, appellee issued its opinion and order, referred to in paragraph IV hereof (Appendix B hereto), and on May 15, 1951, denied appellant's petition for rehearing duly filed with appellee. On June 14, 1951, appellant filed in the Supreme Court of the State of California its petition for writ of review to review and annul said order and opinion of appellee, as provided by the laws of the State of California, and following the filing of additional pleadings and briefs by appellant and appellee, the Supreme Court of the State of California, on August 2, 1951, made and entered its order denying appellant's petition for such writ of review (Appendix A hereto). No procedure being provided under the laws of the State of California for the filing of a petition for rehearing in a matter of such nature, none was filed by appellant.

VI. The grounds upon which it is contended the questions involved are substantial are, among others, that there exists a direct conflict between the federal government and the State of California as to jurisdiction concerning economic regulation of appellant's operations within the State of California, the administrative agencies of both governments having asserted jurisdiction over appellant. The conflict which exists is exemplified by the situation present in the instant matter, as more fully set forth in paragraph V hereof. Briefly stated, as of March 1, 1951, the Civil Aeronautics Board of the United States authorized appellant to increase its fare for certain transportation of passengers within the State of California from $9.95 to $11.70, and appellant put such increased fare into effect on said date. As of May 9, 1951, appellee, Public Utilities Commission of the State of California, holding that it had jurisdiction over appellant and such increase to

have been unlawful in that it had not been previously approved by said Commission, ordered appellant to make reparation wherever possible of fares charged by it in excess of $9.95 during the period between March 1, 1951, and May 9, 1951.

This case involves an important question of Federal law which has not been, but should be, settled by this Court. This Court has never decided the question of whether or not an air carrier holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board of the United States, pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. 401 *et seq.*) is subject to the regulatory control, with respect to its rates, fares and charges, of a state in which a portion of its operations are conducted. Among the factors which distinguish this matter from others which, on their face, might appear to involve similar questions are the fact that the intrastate and interstate operations of appellant are interwoven to such a degree that it is not possible to regulate one without directly impinging upon and regulating the other. This is an area in which uniformity in regulation is essential. (*People v. Gook*, 69 S. C. 841 at 842-843; 336 U. S. 725.) Furthermore, the United States has assumed an obligation under the Civil Aeronautics Act of 1938, as amended, through the medium of compensation for the transportation of mail, to place such carriers in such financial position as to insure the performance of the mail transportation service and to enable such carriers to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the National Defense (52 Stat. 998, 49 U. S. C. 486(b)), there-

by excluding the states from the regulation of such carriers. The matter at issue is, therefore, of utmost importance not only to the entire air transportation industry of the United States but also to each state which may have attempted, or may intend to attempt, to impose such regulation upon air carriers operating within its boundaries.

VII. The cases believed to sustain the jurisdiction are as follows:

(a) The Supreme Court of California is the only court of that state which has authority to review orders of the Public Utilities Commission of that state. Therefore, the decision of the Supreme Court of California is a final judgment or decree of the highest court of the state in which a decision may be had.

Public Utilities Act, Section 67 (Deerings General Laws, Act 6386).

(b) The denial by the Supreme Court of California of appellant's petition for a writ of review to review and annul the order and decision of the Public Utilities Commission is a decision affirming said order and decision.

Funeral Directors Association v. Board of Funeral Directors, 22 Cal. 2d 104;

McDonough v. Garrison, 68 Cal. App. 2d 318;

Napa Valley Electric Company v. Railroad Commission of the State of California, 251 U. S. 310 (the name "Public Utilities Commission" was substituted for "Railroad Commission" by amendment of Article XII, Section 22, of the California Constitution in 1946);

Adams v. Decoto, 21 F. 2d 221.

(c) The provisions of a state constitution are "statutes" within the meaning of 28 U. S. C. 1257 (2).

Lincoln Federal Labor Union, No. 19129 v. Northwestern Iron and Metal Co., 335 U. S. 525;

Adamson v. California, 332 U. S. 46.

(d) Orders of State commissions or administrative bodies exercising delegated legislative authority are "statutes" within the meaning of 28 U. S. C. 1257(2).

Lake Erie and Western Railroad Company v. State Public Utilities Commission of Illinois, 249 U. S. 422;

Bluefield Water Works and Improvement Company v. Public Service Commission of the State of West Virginia, 262 U. S. 679;

Northern Pacific Railway Company v. Department of Public Works of Washington, 268 U. S. 39;

Live Oak Water Users' Association v. Railroad Commission of the State of California, 305 U. S. 354;

Sultan Railway & Timber Company v. Department of Labor and Industries, 277 U. S. 135.

VIII. The federal questions sought to be reviewed were raised before the Public Utilities Commission of the State of California, orally before said Commission in the course of the hearings conducted by it leading up to the order and decision affirmed by the Supreme Court of California; in appellant's brief submitted to said Commission prior to the issuance of its said order and decision, in appellant's petition for rehearing submitted to said Commis-

sion following the issuance of its said order and decision, in appellant's petition to the Supreme Court of the State of California for a writ of review to review and annul said order and decision, and in appellant's reply to the answer of said Commission opposing appellant's petition to the Supreme Court of the State of California for a writ of review. Said Public Utilities Commission denied the validity of appellant's contentions with respect to said federal questions, and the Supreme Court of the State of California, by its denial of appellant's petition for writ of review, under the practice of the State of California, affirmed said holding of said Commission. The following quotations of specific portions of the record support appellant's assertion that the ruling of said Court was of a nature to bring the question within the statutory provision believed to confer jurisdiction upon the Supreme Court:

1. Reporter's Transcript of proceedings before the Public Utilities Commission of the State of California in Case No. 5271, March 14, 1951, and March 27, 1951:

> "Mr. Stearns [counsel for appellant]: If this is the appropriate time, before you proceed, I should like to make a statement as to the position of United Lines [*sic*], in connection with the proceeding, if that is permissible." [Tr. Vol. I, p. 7, lines 1-4, incl.]
>
> ". . . Number one, that the Congress of the United States is [*sic*] pre-empted to feel [*sic*] an economic relation [*sic*] as far as air carriers such as United are concerned by the Civil Aeronautics Act of which I think we are all familiar. I don't need to recite portions of it. Congress has pre-empted this field and therefore has exclusive jurisdiction." [Tr. Vol. I, p. 8, lines 10-15.]

"Mr. Stearns: On the basis of that understanding, I will withdraw my objection to the language of the order because I don't want to be technical about that but I would like to reserve the right to secure an extension of time and also to continue in force our legal objections made earlier." [Tr. Vol. I, p. 24, line 25, to p. 25, line 3, incl.]

"Mr. Stearns: Before I call our witness, I would like to make or reiterate the fact that we do not waive our legal objections in this proceeding by taking part in it. I know that is a difficult position to be in and I think the Examiner recognizes that we are in that position. I wish to restate the objections I made before as to [*sic*] the matter of economic regulation of carriers such as United is guided solely by the Civil Aeronautics Act and that in any event this Honorable Commission has not been endowed with the jurisdiction that is required, permitted to regulate United Air Lines, Incorporated economically." [Tr. Vol. II, p. 74, line 24, to p. 75, line 8, incl.]

2. Memorandum in Opposition to Motion for Preliminary Order and Brief of Respondent, United Air Lines, Inc., filed with the Public Utilities Commission of the State of California on behalf of appellant on April 4, 1951, in Case No. 5271:

"UNITED'S OPERATIONS ARE INTERSTATE IN NATURE.

"United's operations in question here are interstate. Assuming merely for the sake of argument that the Commission has the authority to regulate the rates and charges for the transportation of persons and property by air between points entirely within the State of California, the unrebutted evidence

produced by United at the hearing is that the Los Angeles-San Francisco air coach flights carry a substantial number of interstate passengers. The fact that the airplanes involved in transporting such passengers may operate, on particular flights, only within the limits of the state cannot make the transportation anything other than interstate in nature. If a passenger desires to travel, for example, from Seattle to Los Angeles, the fact that he may change planes at San Francisco while en route has no effect on the interstate nature of his journey nor of the transportation of such passenger. Therefore, from that point of view alone, it is obvious that the Commission has no power of economic regulation with respect to the air coach service in question, and any attempt to regulate the same would constitute an unauthorized interference with interstate commerce and would violate the Constitution of the United States.

"Some of the aircraft in the Los Angeles-San Francisco air coach service operate interstate: that is, these aircraft originate in Los Angeles and fly to Seattle and return. Here, then, not only are a number of passengers transported between Los Angeles and San Francisco actually engaged in an interstate voyage, but the very vehicles themselves are so engaged. There can be no argument whatsoever but that under these circumstances the transportation is interstate, and, of course, the Commission cannot regulate the fares charged for any portion of the voyage. Therefore, United is at liberty, subject to the approval or disapproval of the Civil Aeronautics Board, to charge such fares as it may deem desirable between Los Angeles and San Francisco, in the case of the aircraft which operate between Los Angeles and Seattle. Can it be seriously maintained that any

real distinction results merely because in some instances interstate passengers change planes at San Francisco? Even if it be assumed that the Commission has some regulatory authority, where the aircraft operate entirely within the state, can United be logically required to charge some lesser fare on aircraft shuttling between Los Angeles and San Francisco than it does on aircraft operating between Los Angeles and Seattle, where the service rendered between Los Angeles and San Francisco is identical in both cases?

"CONGRESS HAS PRE-EMPTED THE FIELD OF ECONOMIC REGULATION WITH RESPECT TO AIR CARRIERS SUCH AS UNITED.

"The Civil Aeronautics Act of 1938, Section 1(2), defines 'air carrier' as any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation. Section 1(10) defines 'air transportation' as interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. 'Interstate air transportation' is defined by Section 1(21) of the Act as the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, *inter alia*, a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. Section 403 of the Act provides that every air carrier shall file with the Civil Aeronautics Board and print and keep open to public inspection tariffs showing all rates, fares and charges for air

transportation between points served by it, and no air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation than the rates, fares and charges specified in its currently effective tariffs. The Civil Aeronautics Board has power to enforce these provisions, by judicial action if necessary. An examination of the above-mentioned provisions of the Civil Aeronautics Act indicates that United, even as to its Los Angeles-San Francisco operations, is an 'air carrier' engaged in 'air transportation,' and, therefore, under the exclusive regulatory control of the Civil Aeronautics Board. First of all, it should be noted that insofar as the Act includes the transportation of mail within the definition of air transportation, there is no requirement that such transportation of mail be interstate. It is, in fact, *any* transportation of mail by aircraft. It having been established at the hearing that United transports mail on the air coach service in question, it follows as a matter of course that in such service United is engaged in air transportation as defined in the Civil Aeronautics Act. In addition, since United transports interstate passengers on its air coach flights, it is engaged in air transportation under the Act from that point of view. Such carriage comes within the definition of interstate transportation, as mentioned above. Note that to come within the definition of interstate air transportation, there is no requirement that the aircraft itself cross state lines. The requirement is merely that the *carriage* by aircraft be between points in more than one state, or between points in the same state where part of the journey is outside of the state. Therefore, the carriage by United of passengers from Los Angeles to Seattle with a change of

aircraft at San Francisco is as much interstate air transportation as when they are carried in a through aircraft between such points of origin and destination.

"Congress having pre-empted the field of economic regulation with respect to all of United's operation, the State of California is precluded from entering such field." (Memorandum, pp. 3-7, incl.)

3. Petition for Rehearing filed on behalf of appellant with the Public Utilities Commission of the State of California in Case No. 5271 on May 5, 1951:

"1. Petitioner reiterates and urges a reconsideration of the points and arguments made by it in its Memorandum in Opposition to Motion for Preliminary Order and Brief of Respondent dated and filed herein on April 4, 1951, and incorporates herein said Memorandum and Brief as fully as if set forth herein verbatim." (Petition for Rehearing, p. 1.)

"5. With respect to the matter of the pre-emption of economic regulation of air carriers by the Congress of the United States, the opinion of the Honorable Commission disposes of the matter with one brief sentence; namely: 'The Civil Aeronautics Act does not purport to extend economic regulation to intra-state transportation of persons and property other than mail.' It is significant that no authority is cited in support of this proposition, and we respectfully submit there is no such authority. As pointed out in respondent's brief on file herein, under the Civil Aeronautics Act of 1938, an air carrier is any citizen of the United States engaging in air transportation, and air transportation includes, among

other things, the transportation of mail by aircraft. Therefore, since respondent, United Air Lines, Inc., transports mail in the operations which are the subject of the investigation conducted by the Commission, it is an air carrier under the Civil Aeronautics Act. This being so, it is bound to file with the United States government, print and publish tariffs showing *all* rates, fares and charges for air transportation between points served by it, and to abide by such tariffs (Civil Aeronautics Act, section 403). Rates for transportation of mail are treated entirely separately in the Civil Aeronautics Act (see section 406). Certainly the interpretation placed upon the Civil Aeronautics Act by the Civil Aeronautics Board is entitled to considerable weight, and, as the record in this matter shows, that Board has not only permitted tariffs to be filed covering the Los Angeles-San Francisco air coach rate, but has, in effect, dictated what that rate should be.

"6. The opinion of the Commission ignores certain other points made by respondent in its brief; namely, that a large part of the transportation conducted by respondent, United Air Lines, Inc., in its air coach operations between Los Angeles and San Francisco is interstate, and that for that reason alone the rates cannot be controlled by this Honorable Commission. In this connection the Honorable Commission's attention is invited to the opinion of the Attorney General of the State of California, No. 51/47, dated April 6, 1951. That opinion is, in effect, an analysis of section 22 of Article XII of the Constitution and the *Short Line* and *Martinez* cases, *supra*. In other words, it discusses for the most part the same authorities discussed in the opinion of the Honorable Commission in this case in respect of

the question as to whether or not the Commission has constitutional authority to regulate the rates of respondent, United Air Lines, Inc. It is interesting to note that the opinion of the Attorney General, following an analysis of the authorities cited, is that the Commission has 'authority to regulate the rates of *intra-state* air carriers.' (Emphasis supplied.) There is no indication in that opinion that the Commission has such authority with respect to *interstate* air carriers, such as respondent, United Air Lines, Inc. Whether or not the opinion of the Attorney General be sound; it certainly raises an inference that the Commission has no authority over the rates of interstate air carriers." (Petition for Rehearing, pp. 3-5, incl.)

4. Petition for Writ of Review With Memorandum of Points and Authorities in Support Thereof filed in the Supreme Court of the State of California on June 14, 1951, in proceeding S. F. No. 18426:

"Annulment thereof [the order of the Public Utilities Commission above referred to] is sought herein upon the following grounds:

* * * * * * * *

"2. That said order is violative of the Constitution of the United States . . ." (Petition for Writ of Review, p. 8.)

"The United States Has Assumed Exclusive Control of the Rates of Air Carriers.

"The United States Congress has preempted the field of regulation of petitioner's rates, fares and charges, and has thereby removed such matters from the scope of the state regulation. Petitioner is an

air carrier engaged in air transportation, and. as such, all of its rates, fares and charges are subject to the approval or disapproval only of the Civil Aeronautics Board of the United States, and such Board has exercised its authority thereupon.

Civil Aeronautics Act of 1938 (49 U. S. C. 401, 403, 405);

Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314;

Kansas City etc. Ry. Co. v. Daniel, 180 F. 2d 910.

"Respondent's Order Unlawfully Interferes With Interstate Commerce.

"Respondent's attempted regulation of petitioner's rates, fares and charges is an unwarranted and illegal interference with interstate commerce. The unrebutted evidence before respondent, which respondent has ignored in its findings, is that petitioner, in its operations which respondent seeks to control, transports persons, property and mail in interstate commerce, by means of aircraft operating not only on intrastate flights but on interstate flights as well.

Constitution of the United States, Article I, Section 8;

Wabash etc. Ry. Co. v. Illinois, 118 U. S. 557, 30 L. Ed. 544." (Memorandum of Points and Authorities accompanying Petition for Writ of Review, pp. 33-34.)

"Respondent Seeks to Deprive Petitioner of Property Without Due Process.

"Since respondent has no jurisdiction over petitioner, its purported order requiring petitioner to

make reparation unconstitutionally deprives petitioner of its property without due process.

Constitution of the United States, 14th Amendment, Sec. 1." (Memorandum of Points and Authorities accompanying Petition for Writ of Review, p. 37.)

5. Reply to Answer of Respondent, Public Utilities Commission, filed by appellant in the Supreme Court of the State of California on July 13, 1951:

"Respondent, at page 14 of its answer, launches into its argument with respect to the question of federal occupancy of the field of economic regulation of air transportation. As might well be expected, respondent relies principally on precedents having to do with the regulation of surface carriers. In this, respondent fails to recognize certain fundamental differences between that field and the regulation of air carriers. (It should be noted in passing that the decision in *Alabama Public Service Commission v. Southern Ry. Co.*, 95 L. Ed. Adv. Op. 708, cited by respondent, was based in part on an express statutory reservation to the states, in the Interstate Commerce Act, 49, U. S. C. 1(17(a)), of the right to control intrastate services of interstate rail carriers. No such reservation appears in the Civil Aeronautics Act of 1938 (49 U. S. C. 401, *et seq.*). This distinction not only deprives the *Alabama Public Service Commission* case, *supra*, of any significance insofar as it relates to respondent's position, but in fact lends support to petitioner's contention that Congress, through the Civil Aeronautics Act, intended to preempt the field of air carrier regulation in its entirety. Additionally, and to the same effect, the Interstate Commerce Act expressly exempts from its applica-

tion, transportation 'wholly within one state' (49 U. S. C. 1(2)), whereas no comparable provision appears in the Civil Aeronautics Act. See, also, *Panhandle, etc. Co. v. Michigan Pub. Serv. Com.*, 95 L. Ed. Adv. Op. 673, wherein the express statutory reservation to the states in the National Gas Act (15 U. S. C. 717) motivated the court to hold that Congress had occupied only a part of the field.

"When Congress enacted the Interstate Commerce Act, it was dealing with an established form of transportation, and its primary purpose was to regulate (*I. C. C. v. Baltimore, etc. Ry. Co.*, 145 U. S. 265, 36 L. Ed. 699; *Harriman v. I. C. C.*, 211 U. S. 407, 53 L. Ed. 253). But, in 1938, when the Civil Aeronautics Act was adopted, Congress sought principally to foster and develop a form of transportation which had then barely begun to be recognized by the public. Regulation was merely incidental to this primary purpose. To this effect, it set forth in the act a declaration of policy (49 U. S. C. 402), reading as follows:

" 'In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

" '(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

" '(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such trans-

portation, and to improve the relations between, and coordinate transportation by, air carriers;

"'(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair and destructive competitive practices;

"'(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"'(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"'(f) The encouragement and development of civil aeronautics.'

Again, the purpose of Congress clearly appears in section 301 of the Act (49 U. S. C. 451):

"'The Administrator is empowered and directed to encourage and foster the developments of civil aeronautics and air commerce in the United States, and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. The Administrator and the Air Safety Board shall cooperate with the Authority in the administration and enforcement of this Act.'

One important method which Congress chose in order to encourage and foster air transportation was to provide for the fixing, by the Civil Aeronautics Board, of rates to be paid by the Post Office Department for transportation of mail by air. In fixing such rates, the Board was instructed to consider, *inter alia*, 'the need of each . . . air carrier for

compensation for the transportation of mail sufficient . . . together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense.' (49 U. S. C. 486.)

"We respectfully submit that the foregoing citations from the Civil Aeronautics Act of 1938 clearly demonstrate that:

"1. Congress has occupied and intended to occupy, the entire field of economic regulation of air transportation; and

"2. The Congressional purposes, as expressed in the Act, would be wholly incapable of fulfillment were regulation of petitioner's rates not confined to a single agency; namely, the Civil Aeronautics Board. It can scarcely be assumed that Congress would have charged that agency with the duty of fixing rates for the transportation of mail by air, obliging it to take into account the various factors set forth in section 486, *supra*, including the needs of the carriers in the light of *all other revenue of the carriers*, and at the same time have left the way clear for forty-eight separate state commissions to determine what a substantial part of those revenues should be. We should not consider Congress to have been so naive as to create a device whereby the states could require the carriers to furnish services at whatever rates they might see fit, letting the federal government 'make up the difference.' The obligations imposed by the Act of necessity carry with them the right to regulate completely.

"As further evidence of the fact that Congress intended to control intrastate as well as interstate operations of air carriers, it is interesting to note that in section 401 of the Civil Aeronautics Act (49 U. S. C. 481(e)), which section provided for the issuance of 'grandfather' certificates to existing air carriers, Congress saw fit to direct the Civil Aeronautics Authority (now the Civil Aeronautics Board) to issue such certificates with respect to certain wholly intrastate operations, there having been some doubt as to whether or not the general 'grandfather' provisions would cover such operations. Said section reads in part as follows:

" 'If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which airmail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the Authority shall, nothwithstanding any other provision of this Act, issue certificates authorizing the transportation of mail, and *all other classes of traffic for which authorization is sought,* between such points, namely . . . from Bismarck, North Dakota, to Minot, North Dakota, . . . from Detroit, Michigan, to Sault Sainte Marie, Michigan, . . . from Brownsville, Texas, . . . to San Antonio, Texas, . . .' (Emphasis supplied.)

"Furthermore, it would appear that the interpretation placed upon the Civil Aeronautics Act of 1938 by the Civil Aeronautics Board, which is the agency charged with its implementation and enforcement, is entitled to considerable weight. As pointed out in the petition herein, petitioner's rate of $11.70 between

Los Angeles and San Francisco was virtually 'dictated' by the Civil Aeronautics Board. On several occasions said Board has issued certificates of public convenience and necessity for the transportation of passengers, property and mail in wholly intrastate operations. The most recent of these was a certificate of public convenience and necessity issued by the Board on July 11, 1951, to Los Angeles Airways authorizing the inauguration of a helicopter *passenger service* between Pasadena and Los Angeles. Los Angeles Airways has operated, and under said certificate will operate, exclusively in Southern California."

(Reply to Answer of Respondent, Public Utilities Commission, pp. 6-11.)

Respectfully submitted,

.....

OSCAR A. TRIPPET,

Attorney for Appellant.

PAUL M. GODEHN,
JOHN T. LORCH,
EDMUND A. STEPHAN,
Of Counsel.

Service of a copy of the above statement is hereby admitted the ..... day of ....., 1951.

.....

Attorney for Appellee.